Nos. 02-241 & 02-516

In The
Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, *et al.*,

Respondents.

JENNIFER GRATZ and PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE NEW AMERICA ALLIANCE AS AMICUS CURIAE SUPPORTING THE RESPONDENTS

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INTEREST OF THE AMICUS CURIAE[1]

The New America Alliance is a not-for-profit organization of American Latino[2] business leaders who seek to promote the advancement of the American Latino community through economic and political empowerment and public advocacy. The NAA achieves these objectives by development of human capital, enhancement of education, and promotion of strategic philanthropy.

Affirmative action programs at many of the nation's leading universities are vital to the NAA's mission because they have provided Latino Americans of all races meaningful access to higher education. Education has enabled talented Latinos to assume positions in the business world that otherwise would have been denied them. For example, the chairman of the NAA, Moctesuma Esparza, benefited from the affirmative action program at the University of Southern California. Esparza's father had come to the United States from Jalisco, Mexico, in 1918 to escape the turmoil wrought by the Mexican Revolution. In the United States, he migrated as a farm worker and a railroad hand from Texas to Utah to California where he settled in Los Angeles. There, he worked his way up from dishwasher to chef. His son Moctesuma took the opportunity

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[1] This brief is filed with the written consent of all parties that have been filed separately with the Court. No counsel for any party authored this brief in whole or in part, nor did any person or entity, other than amicus or its counsel, make a monetary contribution to the preparation of this brief.

[2] Although "Latino" generally refers solely to males, it is used in this brief to refer both to males and females in the interest of brevity.

that USC provided him and became one of the country's most successful motion picture producers. His film credits include *Gods and Generals, Gettysburg, The Milagro Beanfield War,* and *Selena.* Moctesuma has won over 200 awards, including an Emmy and an Academy Award nomination.

Other members of the NAA have similar success stories that illustrate that affirmative action has the effect of contributing to this nation's ability to provide opportunities for people with talent to succeed where they might otherwise have been excluded, that is, of insuring that people who are capable of succeeding are given the opportunity to succeed, regardless of racial or ethnic background. Harvard University's affirmative action program gave Tom Castro the opportunity to develop the skills and alliances that enabled him to become the chairman and chief executive officer of El Dorado Communications, Inc., a Houston-based Hispanic communications firm grossing $14 million in revenues by 1999. Castro also serves on the board of directors of Infotec, Inc., ranked by *Hispanic Business* as one of the twenty largest Hispanic firms in the nation. NAA member Jorge G. Castro was also able to earn Ivy League accolades because of the affirmative action program of Princeton University and graduated *magna cum laude*. That early success gained him access to Goldman, Sachs & Company and J.P. Morgan in New York City, where he worked before ultimately becoming the chief executive officer and founding principal of Los Angeles-based CIC/HCM Asset Management, which manages $550 million of equity and fixed income investments. NAA member Frank Sánchez benefited from affirmative action at UCLA. He is now chairman and chief executive officer of the Sánchez Family Corporation, which owns and operates McDonald's franchises in East and Downtown

Los Angeles. He also serves on the McDonald's Operators Association of Southern California and the Global Board of Trustees of the Ronald McDonald House Charities. All of these NAA members are actively involved as leaders in civic, charitable, and community affairs.

USC, Harvard, Princeton, and UCLA can boast about the successes of these individuals. These institutions can also boast that their admissions process successfully achieved the desired result: enrollment of those students who are most likely to succeed.

It is precisely this result that the NAA wants to continue to foster and believes that admissions programs such as that at the Law School of the University of Michigan do indeed foster. The NAA supports the Law School in its goal of admitting winners irrespective of race or ethnic origin and, like the Law School, recognizes that competitive consideration of race or ethnic background among many other factors is essential to producing a law school class of winners. Historical as well as current admissions statistics show that when admissions programs fail to give competitive consideration to race and ethnic background along with traditional admissions criteria, schools fail to identify those candidates who are most likely to succeed and instead admit disproportionate numbers from certain races and ethnic groups.

SUMMARY OF THE ARGUMENT

The petitioners, the United States, and all of their *amici curiae* have urged the Court to scrutinize the policy at issue under strict scrutiny because it gives explicit consideration to race and ethnic origin. The respondents

and their *amici curiae* in the courts below accepted the use of this standard, but disagreed regarding the consequences of doing so. The parties now invite this Court to settle their differences regarding the application of the strict scrutiny standard. Doing that – however the case is decided – will launch the federal judiciary into a rigorous inspection of decisions by the States and their employees regarding a complex and vital State function: education. That inspection will be fueled by the promise of damage awards to those who show that *any* explicit consideration of race in admissions policies prevented their enrollment without serving compelling goals or being the most racially neutral means of achieving those goals.

The parties' invitation to turn strict scrutiny on programs such as that here should be rejected because the competitive consideration of race and ethnicity in admissions policies – unlike racial classifications, preferences, and distinctions – is race neutral notwithstanding its explicit reference to race and ethnicity.[3] The University of Michigan policies here for review easily survive such scrutiny. In addition, Our Federalism and the First Amendment prohibit invocation of Title VI of the Civil Rights Act to override race neutral State admissions policies such as those here.

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[3] The terms "race based" and "race neutral," as used herein, are intended to encompass "ethnic based" and "ethnic neutral" respectively. This brief solely discusses the Law School admissions policy. The undergraduate admissions policy appears to be race neutral for the same reasons that the Law School policy is race neutral.

ARGUMENT

I.

The Policy is Race Neutral and Should be Upheld Under Intermediate Scrutiny

While the NAA agrees with the respondents that the policy can survive strict scrutiny, it also contends that the parties and the government err in their agreement that the policy is race based. The policy at issue in fact is race neutral because it considers race solely in an effort to temper the failure of traditional admissions criteria to identify the applicants who are most likely to succeed.

A. The Policy's "Competitive Consideration" of Race is Not a Classification or Preference on the Basis of Race

An intermediate standard of review is appropriate in this case because the policy does not aim to discriminate on the basis of race; rather, it aims to identify those applicants who are most likely to succeed[4] and it permissibly assumes that race will not have any effect on the likelihood that any individual will succeed.[5] On the basis

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[4] For the sake of brevity, this brief uses the verb "to succeed" to mean "to succeed in law school" as well as "to succeed in life." This definition of "succeed" comports with the Law School's definition of "success." According to a memorandum published by the Law School's former dean of admissions, indicators of "success," are " 'intellectual talent, leadership ability, and academic acumen which augers for a lively intellectual community and important contributions to the profession.' " *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 828 (E.D. Mich. 2001), *rev'd*, 288 F.3d 782 (6th Cir. 2002) (en banc).

[5] The Fourteenth Amendment prohibits, of course, governmental discrimination on the basis of race or ethnicity. It does not prohibit

(Continued on following page)

of this assumption, the Law School concludes that race neutral selection criteria should produce a class that proportionally mirrors the races and ethnic origins of its applicants because its criteria are designed to identify those who are most likely to succeed. When consideration of traditional admissions criteria begins to produce a class that is racially or ethnically disproportionate, the Law School recognizes that the traditional admissions criteria are not identifying those who are most likely to succeed, but rather are favoring certain race and ethnic groups over others. At that point, it then gives race and ethnic origin consideration to ensure that traditional criteria do not include, on the basis of race or ethnicity, students who the Law School believes are less likely to succeed. The admissions policy excludes Barbara Grutter not because of her race, but because it has determined that she is less likely to succeed. The admissions policy simply has neutralized the undesired effect of erroneous selection of a student who is less likely to succeed.

The race neutrality of the admissions policy is analogous to the content neutrality of many speech regulations that reference content but which are directed at regulating the secondary effects of speech. Last term, for example, in *City of Los Angeles v. Alameda Books, Inc.*, 122 S. Ct. 1728 (2002), a plurality of the Court held that a zoning ordinance that prohibits operation of more than one adult entertainment business at a single location, such as a bookstore and an arcade of open viewing booths, might be

governmental action based upon an assumption that all people are created equal – that race and ethnicity alone will not affect an individual's likelihood of success.

content neutral even though it "considered" the content of the regulated speech at issue.[6] In reaching this conclusion, the plurality relied on *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). The *Renton* ordinance was aimed not at the content of the films shown at adult theaters, but rather at the secondary effects of such theaters on the surrounding community, namely at crime rates, property values, and the quality of the city's neighborhoods. Therefore, the ordinance was deemed content neutral. *Id.* at 47-49. Justice O'Connor, writing for the plurality, noted that an ordinance would not be deemed content neutral merely because a city claimed that it was aimed at curbing secondary effects; the city would be required to prove a link showing that the secondary effect was caused by the regulated speech. "While the city certainly bears the burden of providing evidence that supports a link between concentrations of adult operations and asserted secondary effects, it does not bear the burden of providing evidence that rules out every theory for the link between concentrations of adult establishments that is inconsistent with its own." *Alameda Books*, 122 S. Ct. at 1735 (O'Connor, J.).

[6] *See also Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (regulation targeted at secondary effects of speech is subject to intermediate scrutiny); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (same); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (same); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (same); *Members of City Council of Los Angeles v. Taxpayers for St. Vincent*, 466 U.S. 789 (1984) (same); *Young v. Amer. Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion) (same); *but see Virginia v. Black*, 262 Va. 764 (Va. 2001) (invalidating ban on cross burning although statute targeted intimidation), *cert. granted*, 122 S. Ct. 2288 (U.S. May 28, 2002) (No. 01-1107).

Justice O'Connor emphasized that in *Renton*, the Court "specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. We held that a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." *Alameda Books*, 122 S. Ct. at 1736 (O'Connor, J.) (citations omitted). She indicated that a municipality would not be allowed to "get away with shoddy data or reasoning," but that its decision would stand if the evidence "fairly support[ed] the municipality's rationale for its ordinance."[7] *Id.*

The same approach can and should be taken here. As long as the evidence fairly supports the respondents' racially neutral rationale for their admissions policy – selection of those who are most likely to succeed – it

[7] Justice Scalia concurred that the plurality's opinion "represents a correct application of our jurisprudence concerning regulation of the 'secondary effects' of pornographic speech." 122 S. Ct. at 1738. Justice Kennedy concluded that the regulation should be labeled content based, but subjected to intermediate scrutiny because it was aimed at regulation of secondary effects. *See id.* at 1740. Justice Souter's dissent in *Alameda* books, joined by Justices Stevens and Ginsburg, pointed out that the majority had classified a regulation as content neutral notwithstanding its explicit reference to speech content and made the interesting observation that there perhaps should be a different label given to such regulations. He wrote: "It would in fact make sense to give this kind of zoning regulation a First Amendment label of its own, and if we called it *content correlated*, we would not only describe it for what it is, but keep alert to a risk of content-based regulation that it poses." *Id.* at 1746 (Souter, J., dissenting) (emphasis added). Justice Souter disagreed with the majority only in whether the evidence before him passed intermediate scrutiny standard and not with the use of that level of scrutiny. *See id.* The race neutral policy here for review could be referred to as race correlated.

should be subjected to intermediate scrutiny.[8] The evidence showing that the Law School's consideration of race is designed to enroll those students who are most likely to succeed is fully discussed by the respondents and the other *amici* in their briefs and therefore will not be repeated here.

The Court's reapportionment cases also provide a framework that shows that the Law School admission policy is race neutral. In *Bush v. Vera*, 517 U.S. 952, 958 (1996), Justice O'Connor, in an opinion joined by Chief Justice Rehnquist and Justice Kennedy, observed:

> Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. Nor does it apply to all cases of intentional creation of majority-minority districts. . . . For strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were "subordinated" to race. By that, we mean that race must be "*the predominant* factor motivating the legislature's [redistricting] decision."

517 U.S. at 958-59 (citations omitted). The Law School plainly has not subordinated legitimate admissions principles to race. Rather, it uses such principles as its primary

[8] Many other government decisions, policies and resource allocations that take race into consideration also plainly should be subjected to intermediate scrutiny because they also consider race, but only for race neutral purposes. *See, e.g.*, 20 U.S.C. ch. 33 (providing support for minority education); 29 U.S.C. § 718 (providing vocational rehabilitation and other rehabilitation programs for traditionally underserved populations, including African Americans, Latinos, and Native Americans); 42 U.S.C. § 247b-12 (authorizing expansion of research relating to higher rates of mortality among African American women).

admissions criteria and then resorts to race or ethnic group only to attempt to eliminate the deleterious effect of application of traditional criteria alone.

The Law School's conclusion from the results of grade and test score based screens is that use of such selection criteria alone will exclude applicants who are most likely to succeed and that this impact prevents it from achieving its educational mission. While such an impact may not itself violate the Fourteenth Amendment in the absence of an intent to use it for a discriminatory purpose,[9] there is no requirement in the Fourteenth Amendment that such a disproportionate impact must be allowed to stand. Federal, state, and local governments are free to end or modify regulations that prevent them from achieving race neutral objectives, if they choose to do so through a method that is not simply a discriminatory quota system, but rather that gives "competitive consideration" to race. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1973) (Powell, J.). Under the law school's policy "the guarantee of equal protection" does not "mean one thing when applied to one individual and something else when applied to a person of another color." *Bakke*, 438 U.S. at 289-90. The Law School's policy is simply an acknowledgment that mechanical admissions policies are not adequate to achieve the race neutral objective of selecting "winners" – those who will succeed in law school according to the many indicators of success that the Law School relies upon.

[9] *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (holding that a facially neutral regulation that has a disproportionate racial or ethnic impact will be upheld in the absence of discriminatory intent).

Indeed, the policy will operate at all times to counteract the tendency of facially neutral traditional admissions criteria to overlook some candidates who are most likely to succeed.

A policy such as that at issue here does nothing to stigmatize any individuals on the basis of race or ethnic origin because it does not teach that "because of chronic and apparently immutable handicaps, minorities cannot compete with [the majority] without their patronizing indulgence." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring). Just the opposite, the policy here teaches that all racial and ethnic groups are equal, that all groups are equally likely to succeed, and that race neutral admissions policies should produce proportionate racial diversity. The policy at issue here teaches that "In the eyes of the government, we are just one race here." *Id.* at 239 (Scalia, J.).

The race neutrality of the Law School admissions policy is further demonstrated by the petitioners' assertion that other admissions policies that will achieve the same level of diversity are themselves race neutral. A close review of those policies demonstrates that while they do not make explicit reference to race or ethnicity, they pose a far greater danger that they will exclude on the basis of race applicants who are most likely to succeed.[10] If the

[10] A far stronger case can be made for subjecting these alternative policies to strict scrutiny. *See Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 471 (1982) (although referendum "nowhere mentions 'race' or 'integration' " and therefore was "facial[ly] neutral[ ]," the Court concluded the referendum left "little doubt that the initiative was effectively drawn for racial purposes").

Court accepts that these alternatives are race neutral, it should treat the Law School policy as race neutral as well.

The petitioners and the Government focus primarily on the "percentage plans" adopted in Florida, California, and Texas as "race neutral" alternatives that are available to achieve the same racial diversity as race based programs. These plans ensure the admission to state universities of a certain percentage of all students graduating from each high school. The plans are based on the theory that high schools are so racially and ethnically segregated that admission of a certain percentage of the students who received the best grades and standardized test scores will result in admission of a higher percentage of minority students than if grades and test scores were used as the sole determining factors. "Given the racial and economic segregation in the state's high schools, the assumption was that blacks and Hispanics would be given a fairer chance to enroll, without having to compete directly with non-Hispanic whites who lived in richer districts."[11] Put differently, these programs are able to achieve diversity "only if secondary education remains firmly racially segregated."[12] The "percentage plans" are based upon the "current day educational apartheid" existing in these states and throughout the country.[13] Nevertheless, these plans are touted as "race neutral"

[11] Jacques Steinberg, *Asian-American Students Rise as Affirmative Action Ends*, N.Y. Times, Feb. 2, 2003, at WK3.

[12] Michelle Adams, *Isn't it Ironic? The Central Paradox at the Heart of "Percentage Plans"*, 62 Ohio St. L.J. 1729 (2001).

[13] *Id.*

because they make no explicit reference to race.[14] Because the plans were designed specifically to achieve the same racial diversity as those that they have supplanted,[15] they are no more race neutral than the policy here under review. In fact, they are far less race neutral because of their abhorrent reliance on racial segregation in high schools to achieve diversity in colleges and post-graduate schools and in their failure even to deliver the diversity that they promise. Moreover, they teach individuals that they can increase their odds of admission by attending a racially segregated school because that is where the lowest grades and test scores are expected to be found. Fundamentally, these plans are based on the erroneous assumption that there is nothing discriminatory about facially

[14] Whether a policy makes "explicit reference" to race should not be determinative of whether the policy is a race based classification. *See Bush v. Vera*, 517 U.S. 952, 958 (1996) (O'Connor, J.). As an examination of the so-called race neutral alternatives demonstrates, a facially race neutral policy can be far more racially discriminatory than a policy that facially gives race consideration but achieves a nondiscriminatory objective such as enrolling those students who are most likely to succeed. *See Miller v. Johnson*, 515 U.S. 900, 905 (1995) (equal protection principles apply not only to legislation that contains explicit racial distinctions, but also to laws neutral on their face, but " 'unexplainable on grounds other than race' ") (quoting *Arlington Heights*, 429 U.S. at 266).

[15] *See, e.g.*, Brian Bucks, *Affirmative Access Versus Affirmative Action: How Have Texas' Race-Blind Policies Affected College Outcomes?* at 2, http://www.ssc.wisc.edu/~scholz/Seminar/Bucks_Raceblind.pdf (Dec. 3, 2002) ("The Ten Percent Plan seeks to promote diversity by ensuring college access for high-achieving students from across the state's highly segregated high schools, especially those from schools that have traditionally sent few graduates to Texas' flagship universities").

neutral admissions criteria that have the effect of admitting a class of entirely one race.

The Law School's admissions policy is unlike "affirmative action" plans that this Court has previously invalidated as involving impermissible racial classification. In fact, characterization of the Law School policy as an "affirmative action" plan is something of a misnomer because it is not attempting to remedy the effects of its own or society's past discrimination or to advance the members of any racial or ethnic group over another. The policy is used simply to try to find those students who best enable the Law School to fulfill its educational mission and the policy is based on a permissible assumption that a successful search for these students will produce a proportionally diverse class.

By contrast, the admissions policies under review in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1973), simply reserved a number of spaces in its entering class for minority students, irrespective of whether they were the most likely to succeed. The rigid quota system in *Bakke* precluded non-minority students from competing with those minority students for whom seats at the university's medical school had been set aside. The Court correctly subjected this simple system of favoring minority over non-minority applicants to strict scrutiny. *Id.* at 287. The Law School policy here does not favor any race over another. It assumes that there are no distinctions based on race and that if an admissions policy fails to produce a class that is proportionately diverse, that policy must be excluding applicants on the basis of race.

Significantly, Justice Powell contemplated that an admissions policy designed to ensure that students were

not excluded from admissions on the basis of race and ethnicity would be subjected to intermediate scrutiny when he wrote that the courts below erred in enjoining the University of California "from ever considering the race of any applicant" because "the State has a *substantial interest* that legitimately may be served by a properly devised admissions program involving the *competitive consideration* of race and ethnic origin." *Id.* at 320 (emphasis added). By using the term "substantial interest" Justice Powell recognizes that "a properly devised program involving competitive consideration of race and ethnic origin," as opposed to a set-aside program such as that at issue in *Bakke*, is subject to intermediate, not strict, scrutiny.

In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1996), the Court reviewed whether a school board could adopt race based preferences in determining which teachers to lay off. A collective bargaining agreement between the school board and a union provided that if it became necessary to lay off teachers, those with the most seniority would be retained, except that no teacher would be laid off if that teacher's lay off would decrease the percentage of minority teachers employed below the percentage employed prior to the lay off. The policy did not seek to preserve the most qualified teachers, those that might be classified as the "winners," but rather it sought to protect minority teachers. This was an attempt to favor minority teachers solely on the basis of their race, rather than an attempt to fulfill a race neutral goal such as maintaining the best teachers available.

The school board sought to justify this discriminatory classification by its interest in "providing minority role models for its minority students, as an attempt to alleviate

the effects of societal discrimination." *Id.* at 274. Justice Powell's plurality opinion correctly observed that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." *Id.* at 273 (Powell, J.). Justice O'Connor agreed, observing that racial classifications that work to the disadvantage of 'nonminorities' should be reviewed applying the strictest scrutiny. *Id.* 476 U.S. at 283 (O'Connor, J.).

This Court concluded that the goal advanced by the school board was not compelling because the board had not shown prior discrimination by the board itself. The Court found that the school board's role model theory had no stopping point at which the purported remedy would be achieved. Moreover, the Court found a lack of relationship between the role model theory and past discrimination in society generally because "societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Id.* at 276.

The Law School policy, by contrast, is not designed to provide minority role models nor to attempt to alleviate the effects of societal discrimination, and it does not set aside a number of positions based solely on the race of applicants. Rather, it is designed to select those students who are most likely to succeed. It correctly assumes that race neutral admissions criteria will produce a racially diverse class and that criteria that produce substantial under-representation are not, in reality, race neutral. The *Wygant* policy was not based on an assumption of equality, but rather based on an assumption that remedial measures should be taken to remedy past discrimination and the Court correctly held that if that was the objective, the

school board's policy must be regarded as race based and that it must have a compelling justification for that policy.

Following its decision in *Wygant*, the Court invalidated yet another affirmative action plan applying the strictest standard of review in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Richmond's implemented quota system required prime contractors who received city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "minority business enterprises." An attempt to remedy the effects of past discrimination in the construction industry in Richmond formed the basis for the race based classification – not an attempt to find the most qualified contractors. Justice O'Connor, writing for a plurality, observed that the "Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based *solely* upon their race." *Id.* at 493. This policy, like the policy stricken in *Wygant*, was premised on the assumption that minorities needed race based assistance to overcome the effects of past discrimination. It was not premised, as is the Law School policy, on the assumption that race neutral selection criteria will produce a racially diverse result and that selection criteria that do not do this are flawed. The Court also correctly subjected the *Croson* policy to strict scrutiny because it imposed "a rigid rule erecting race as the *sole* criterion in an aspect of public decisionmaking." *Id.* (emphasis added). The Law School policy does not use race as the sole criterion, but rather relies predominantly on traditional, legitimate admissions criteria.

In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), this Court considered the federal government's "practice of giving general contracts on government

projects a financial incentive to hire subcontractors controlled by 'socially and economically disadvantaged individuals,' and in particular, the Government's use of race-based presumptions in identifying such individuals." *Id.* at 204. The government urged that "'[t]he Subcontracting Compensation Clause program is . . . a program based on *disadvantage,* not on race," and thus that it is subject only to the most relaxed judicial scrutiny." *Id.* at 212-13. The Court agreed that provisions of the program were race neutral, but that a "'race-based rebuttable presumption used in some certification determinations under the Subcontracting Compensation Clause'" were not race neutral and held they would be subject to strict scrutiny. *Id.* The presumptions required contractors to "'presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities.'" *Id.* at 205. The Law School makes no such presumptions. Rather, it presumes that race and ethnic origin are not determinative of the likelihood that one will succeed and that an admissions policy that does not produce proportional representation is eliminating those that are most likely to succeed. Thus, the strict scrutiny applicable to the race based policy in *Adarand* is not applicable to the race neutral policy now before the Court.

Bakke, Wygant, Croson, and *Adarand* are good examples of cases where the Court correctly categorized programs as imposing race and ethnic origin classifications on individuals and correctly subjected those classifications to the strictest judicial review. By contrast, the Law School admissions policy is unlike any of the race based policies in those cases and so a different standard of review is appropriate. Under the Law School's admissions policy no

individual is favored or disfavored on account of the individual's race or ethnic origin. A line is never drawn between groups or individuals on account of their race or ethnic origin and no special token is reserved for a specific racial or ethnic group or individual. Rather, the Law School's admissions policy allows for "competitive consideration of race" under which all applicants, both minority and non-minority alike, have an equal opportunity to prove that their qualifications and unique experiences make them "winners."

B. The Policy is a Properly Devised Program that Legitimately Serves a Substantial Interest

A race neutral regulation that nevertheless makes reference to race should be subjected to intermediate scrutiny to ensure that it is not being used for discriminatory purposes. The first prong of the intermediate scrutiny test is to determine whether the policy was adopted to serve a substantial interest. The interest of the law school was "'to pick winners.'" *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 828 (E.D. Mich. 2001), *rev'd*, 288 F.3d 782 (6th Cir. 2002) (en banc). That interest is a traditional interest served by many law school admissions policies and generally recognized as a substantial interest.[16]

The evidence established that the Law School's consideration of race directly advanced that interest

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[16] *See generally* W. Scott Van Alstyne, Jr., Joseph R. Julin & Larry D. Barnett, *The Goals & Missions of Law Schools* 35 (Peter Lang 1990) (setting forth traditional factors for creating a prestigious law school and arguing that striving to obtain that goal "may well be an educational and professional disservice to the citizenry").

because it resulted in both the admission of students who met traditional admissions criteria and diversity of the student body closely proportionate to the diversity of the applicant pool – the two critical components of a class that includes those applicants who are most likely to succeed. *Id.* at 821. The evidence showed that if the Law School had considered median undergraduate GPA and LSAT scores alone, the admitted class would have lacked the diversity indicating that those most likely to succeed had been selected. *Id.* The evidence further showed that under the policy, race was "not a 'primary consideration' in making admissions decisions." *Id.* at 831. Therefore, the policy legitimately and directly served the substantial interest for which it was adopted.

II.

Federal Laws Cannot Restrict Race Neutral State Experimentation with Educational Admissions

The petitioners and the United States ask this Court to direct the federal judiciary to eradicate hundreds of affirmative action programs that have been implemented in every State in the country and to award both compensatory and punitive damages to each individual who has been denied admission to these State schools as a consequence of the schools' "consideration" of race. The Court should be reluctant to interpret federal law as so intrusive on the sovereignty of the States. Moreover, federal law may not so restrict the First Amendment right of academic freedom.

A. Congress Lacks Power to Compel States to Adopt Admissions Policies that Do Not Give Race Consideration

An inquiry into whether Congress has the power to abrogate unilaterally the States' immunity from suit under the Eleventh Amendment focuses on whether the Act in question was passed pursuant to a constitutional provision granting Congress the power to abrogate. *See, e.g., Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976). Authority to abrogate plainly exists under the Fourteenth Amendment, which explicitly expands federal power at the expense of state autonomy, altering the balance of state and federal power struck by the Constitution. *See id.* at 455. Section 1 of the Fourteenth Amendment contains prohibitions expressly directed at the States, and section 5 expressly provides that "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." *Id.* at 453 (internal quotation marks omitted).

Not all legislation purporting to rest on the Fourteenth Amendment successfully abrogates State sovereignty, however. This Court held in *Alden v. Maine*, 527 U.S. 706 (1999), that only "[w]hen Congress enacts *appropriate legislation* to enforce this Amendment, see *City of Boerne v. Flores*, 521 U.S. 507 (1997), federal interests are paramount, and Congress may assert an authority over the States which would be otherwise unauthorized by the Constitution." 527 U.S. at 756 (emphasis added).

In *Flores*, this Court invalidated the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.*, as a statute that exceeded Congress's powers under section 5 of the Fourteenth Amendment. Congress enacted RFRA in reaction to *Employment Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S.

872 (1990), in which the Court upheld an Oregon statute of general applicability that made use of peyote criminal. The plaintiffs, members of the Native American Church, had claimed that the law abridged their Free Exercise rights under the First Amendment because their practice was to ingest peyote for sacramental purposes. The stated purpose of RFRA was to extend federal protection to that practice because the Court had found that the Fourteenth Amendment did not protect the practice. In holding that RFRA violated State sovereignty, the Court held that Congress could not rely on section 5 of the Fourteenth Amendment. "Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is." *Flores*, 521 U.S. at 519. "It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the 'provisions of [the Fourteenth Amendment].'" *Id.* (citation omitted). Preventive measures enacted pursuant to section 5 are appropriate when there is reason to believe that many of the laws affected by the measure are unconstitutional.[17] But,

[17] *See, e.g., City of Rome v. United States*, 446 U.S. 156, 161 (1980) (upholding 7-year extension of the Voting Rights Act's requirement that certain jurisdictions preclear any change to a "'standard, practice, or procedure with respect to voting'"); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding 5-year nationwide ban on literacy tests and similar voting requirements for registering to vote); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding several provisions of the Voting Rights Act of 1965); *Katzenbach v. Morgan*, 383 U.S. 641 (1966) (upholding ban on literacy tests that prohibited certain people schooled in Puerto Rico from voting).

remedial legislation under section 5 "should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against."[18]

A law enacted pursuant to section 5 of the Fourteenth Amendment to prohibit a state university from using race neutral admissions criteria that give proper consideration to race is not appropriate legislation pursuant to the Fourteenth Amendment for it does nothing to carry out the mandate of the due process found in the Fourteenth Amendment. Instead, it simply imposes on state universities the view of Congress that different admissions criteria should be used. States ought not have the power to decide how they will educate stripped from them in this fashion. "Congress has vast power but not all power. When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central Government and the separate States. Congress has ample means to ensure compliance with valid federal laws,

[18] *Civil Rights Cases*, 109 U.S. 3, 13 (1883); *see also Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (Americans with Disabilities Act of 1990 exceeded authority of the Fourteenth Amendment by authorizing damages actions against States); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 72-73 (2000) (Age Discrimination in Employment Act exceeded authority of the Fourteenth Amendment by authorizing damages actions against States); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank & Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 627 (1999) (invalidating Florida statute as not enacted to enforce the guaranties of the Fourteenth Amendment).

but it must respect the sovereignty of the States." *Alden*, 527 U.S. at 758.

The Court's obligation, of course, is to interpret federal legislation, wherever possible, as consistent with the Constitution. That can be easily accomplished in this case by holding that Title VI simply does not require state universities to abandon race neutral admissions policies that merely give race consideration for the purpose of achieving race neutral objectives.

B. Federal Laws Would Violate the First Amendment if They Imposed Liability for All Admissions Policies that Give Race Consideration

The federal laws upon which the plaintiffs base their claims should be interpreted consistently with the Fourteenth Amendment. As importantly, they should not be interpreted as compromising the fundamental right of academic freedom guaranteed by the First Amendment. The Court's "understanding of academic freedom has included not merely liberty from restraints on thought, expression, and association in the academy, but also the idea that universities and schools should have the freedom to make decisions about how and what to teach."[19] In *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985), the Court recognized that "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by

[19] *Bd. of Regents, Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 236, 237 (2000) (Souter, J., concurring).

the academy itself." *Id.* at 226, n.12 (citations omitted). In *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), Justice Frankfurter, concurring and joined by Justice Harlan, explained the importance of a university's ability to define its own mission as follows: "'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'" *Id.* at 263 (citations omitted).

Petitioners urge the Court to interpret Title VI as cutting deeply into this important First Amendment freedom. The actions of state educators in giving effect to race neutral admissions policy should be considered unlawful, if at all, only upon a showing that, although the policy was race neutral, the actions of the respondents were nonetheless a sham designed to further unlawful discrimination. Such a standard would be consistent with that employed by this Court in other contexts to avoid drawing a federal statutory scheme into unnecessary conflict with First Amendment rights.

Most notably, in the antitrust context this Court has held that "the Sherman Act does not prohibit . . . persons from associating . . . in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly."[20]

[20] *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961).

The Court later made clear that this antitrust immunity "shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose."[21] This immunity, however, does not extend to "illegal and reprehensible practice[s] which may corrupt the . . . judicial process[ ],"[22] or to lobbying "ostensibly directed toward influencing governmental action [that] is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor."[23] As this Court recently explained, "[t]his line of cases thus establishes that while genuine petitioning is immune from antitrust liability, sham petitioning is not."[24]

Because of the First Amendment rights involved, the respondents' burden of proving a "sham" is a heavy one. In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60-61 (1993) the Court held that the action "must be objectively baseless" and the litigant's motivation must conceal a prohibited intent. This "sham" standard reflects this Court's recognition that the First Amendment requires that protected activities be given some "breathing space."[25]

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[21] *Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965); *see Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972) (extending *Noerr-Pennington* immunity principles to situations where groups "use . . . courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-à-vis their competitors").

[22] *Cal. Motor Transp.*, 404 U.S. at 513.

[23] *Noerr*, 365 U.S. at 144.

[24] *BE&K Constr. Co. v. NLRB*, 122 S. Ct. 2390, 2396 (2002).

[25] *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341-342 (1974) (noting the need to protect some falsehoods to ensure that "the freedoms of speech

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In light of the vital First Amendment rights involved in the educational process, this Court should apply a similar standard to this case. Title VI of the Civil Rights Act of 1964 and, *a fortiori*, the Fourteenth Amendment safeguard critically important rights. But when a challenge is brought to a race neutral admissions policy, the resulting legal analysis should take account of the important First Amendment interests at stake. The resulting test would not immunize the admissions process from scrutiny, but it would force a party challenging a neutral admissions policy to meet a demanding standard by showing that actions that purport to be protected First Amendment conduct are, in fact, a sham.

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and press [receive] that 'breathing space' essential to their fruitful exercise") (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

CONCLUSION

The decision of the Sixth Circuit should be affirmed because the respondents' policies are race neutral, supported by substantial interests, and legitimately serve those interests. In addition, the Court should affirm dismissal of all claims under Title VI because Congress lacks the power to compel states to adopt admissions policies that do not give race consideration and because plaintiffs have not demonstrated that the race neutral policies at issue were a sham.

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